

been called for, and delegate Harris is stating that, in fact, there is nothing to substitute for, since the amendment deleted that paragraph.

MR. SCHRAG: It's not a substitute at this point, Mr. President. It's an insertion into the section. At this point, it's a motion to amend the section by inserting a paragraph which would be a new second paragraph to the section.

MS. HARRIS: Point of information, Mr. Chair.

MR. BALDWIN: Point of information, delegate Harris.

MS. HARRIS: The point of information is that we just voted to delete lines 12 through 14, and there's nothing to add to and there's nothing to attach to, because it has been deleted. So, I think the amendment at this point is out of order.

MR. SCHRAG: I'm adding to the section. There is no paragraph there now, but I'm inserting a new paragraph to add to the section.

MR. BALDWIN: Delegate Jackson?

MR. JACKSON: Point of order, Mr. Chair. What Mr. Schrag is nothing illegal. All he is doing, then, is bringing forth a new idea. Therefore, it is indeed an amendment; that's all it is. It's a different idea. It has several words. It takes out a concept, which anyone on this floor can do; we've

been doing it for three months.

MR. BALDWIN: The Chair will hear one other comment and then the Chair will rule. Delegate Cassell?

PRESIDENT CASSELL: I think the point has been made that what the delegate is doing is simply adding a paragraph. The last motion deleted a paragraph. His motion is to add a paragraph. He adopts some of the language of the previous one, so I think it's quite in order.

MR. BALDWIN: The Chair promised that after one other person spoke, he would rule. In fact, the Chair does concur with delegates Jackson and Cassell. Those of you who are not in favor, all you have to do is vote down the Schrag amendment. We have accepted it.

Is there any further discussion on the Schrag amendment? Delegate Bruning?

MR. BRUNING: Yes. We have been told by several delegates here that the Bill of Rights of the Constitution goes far enough in protecting the press, and that's sufficient and leave it at that. I think we're wrong about that, to be honest with you.

We're now in a situation legally in which police can go into the rooms where the press are, go through their files looking for information, go through their trash cans, go

through all sorts of things -- ransack the place, if need be -- looking for information. That is the law of the land right now.

Now, I don't know about you, but I have problems with that. That brings up the situation in the 1930s when Fascism was taking over, and let me be blunt about that. I think that is a potential danger that we should not open ourselves up to.

And then let's look at the question of confidential sources of information. Indeed, we may have a Janet Cook sometimes, but what happens if somebody comes up with evidence that the present government has violated the law and has been having favorable contracts?

I am much more leery about the fact that the government can, under the guise of obtaining information, essentially use the police reports as a political weapon against the press. This language clears up the problem about compulsory testimony, so nobody is going to get executed because the press has testimony that could be collaborated, and protects the very vital sources of information.

If you can think of anybody that would talk about a confidential matter about official wrongdoing knowing that at some time or another that information could be seized by

the police --

MR. BALDWIN: Time, delegate Bruning.

MR. BRUNING: -- I think you won't find them.

MR. BALDWIN: Delegates Freeman and Jones.

MS. FREEMAN: Pass.

MR. BALDWIN: Delegate Freeman passes. Delegate Jones?

MS. JONES: I'd like to disagree with Mr. Bruning, and I'd like to urge the convention to vote down the amendment. Jack Anderson reports on confidential memoranda off of the President's desk, and nobody indicts him or takes him to court or sends him to jail. And I don't think anybody is going to do that to the press, so I'd like to urge you to vote down delegate Schrag's amendment because it adds nothing to it, and let's go on.

MR. BALDWIN: I would ask the committee to respond. Delegate Jackson?

MR. JACKSON: Yes, sir. I can completely understand people's vehemence against the press. I can understand that to a certain degree, but you must understand one thing. Everyone has a press; people speak through different vehicles. What you would say now, then, is that no one shall criticize the government because whoever criticizes that government

shall then be required to give their sources to the cops. Now, that is what you are saying.

Now, one other thing: There is nothing in the world that the press can find that 3,000 police from Washington, D. C. cannot find. So, when someone speaks about justice, let's not confuse this now. If someone wants to deal with justice in another section, let's deal with that, but not in this section here.

And let me say one thing, since everyone else has. You know, people call themselves civil libertarians around this thing, but this is not civil liberty.

MR. BALDWIN: At this point, the Chair senses that we're ready to terminate debate. Delegate Simmons?

MS. SIMMONS: I just wish to share with the body an observation. A constitution has historically been known as a document of, by and for the people. I find it fascinating that for 85 days, we've been reiterating that everything must look like other constitutions; "don't give them anything strange or new."

But when we get ready to be avant-garde, it's not to be avant-garde in terms of rights and privileges for people, but for an institution called the press -- interesting observation.

MR. BALDWIN: Further discussion?

MS. HARRIS: I move the previous question.

(The motion was duly seconded.)

MR. BALDWIN: The previous question has been called for and seconded. Those in favor, signify by saying yes.

(A chorus of "yeses.")

MR. BALDWIN: Those opposed, nay.

(No response.)

MR. BALDWIN: Abstentions?

(No response.)

MR. BALDWIN: Debate has been terminated. We will now vote on the Schrag amendment. Those in favor of the Schrag amendment, signify by a show of hands.

MR. COOPER: Sixteen.

MR. BALDWIN: Those in opposition, likewise.

MR. COOPER: Twenty-one.

MR. BALDWIN: Abstentions?

MR. COOPER: One.

MR. BALDWIN: The Schrag amendment was rejected.
Delegate Love?

MR. LOVE: I'd like to move Section 2, as amended.

(The motion was duly seconded.)

MR. BALDWIN: It has been properly moved and seconded

that we adopt Section 2, as amended. Those in favor, signify by saying yes.

(A chorus of "yeses.")

MR. BALDWIN: Those in opposition, nay.

(There were three "nays.")

MR. BALDWIN: Abstentions?

(Two hands were raised.)

MR. BALDWIN: Section 2 has been adopted. At this point, the President will assume the Chair.

PRESIDENT CASSELL: Thank you, Mr. Baldwin. Let me remind you that we have agreed that the questions shall be no longer than two minutes and the responses shall be no longer than two minutes; that the committee will be called upon to have a spokesperson to respond to questions. Only if the response is not satisfactory shall there be a response from an additional person on the committee.

MR. MASON: I move Section 3.

PRESIDENT CASSELL: Our parliamentarian is not with us tonight; he had a previous engagement which he advised us of before he took this particular position. The Chair will ask the First Vice Chairperson to act as the parliamentarian tonight in order to continue with the expeditious pace that we have enjoyed up to this point.

The committee will now be asked to make its presentation of Section 3. Delegate Mason?

MR. MASON: I move Section 3, "Ban Against Slavery and Involuntary Servitude."

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been moved and seconded that Section 3, "Ban Against Slavery and Involuntary Servitude," be adopted. Is there discussion?

(No response.)

MR. MARCUS: Call the question.

MR. KAMENY: Call the question.

PRESIDENT CASSELL: There being no discussion, the question has been called. Those in favor of terminating debate, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(No response.)

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: Those in favor of adopting Section 3, as written, please indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(There was one "nay.")

PRESIDENT CASSELL: Abstain?

(One hand was raised.)

PRESIDENT CASSELL: Section 3 is adopted; very good.
Delegate Mason, Section 4.

MR. MASON: Mr. Chair, I move Section 4, "Due
Process."

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been moved and seconded
that Section 4 be adopted. Delegate Harris has an amendment
to offer to Section 4. Delegate Harris?

MS. HARRIS: Mr. President, it appears to me that
line 7 of Section 4 -- and the words are, "nor make a
significant change in any person's life" -- it's too broad,
it's unclear. It could refer to anything -- marital status,
religion, or culture.

I'd like to move more specific language here by
proposing that those words be deleted, and in its place the
words should be "nor be deprived equal protection of the
laws, enjoyment of a person's civil rights, or be discriminated
in the exercise thereof," and it would go on to say "without
due process of law."

PRESIDENT CASSELL: Mr. Secretary, do you have that

amendment?

MR. COOPER: I'd like to have it in writing.

PRESIDENT CASSELL: All right. Would you pass that to him?

Is there a second to that amendment?

(The motion was duly seconded.)

PRESIDENT CASSELL: Okay. The amendment that was just read has been moved and seconded.

MR. LOVE: Would you read it again, please?

PRESIDENT CASSELL: Mr. Secretary, would you read that once more? Please, let us have quiet so that we can hear this; it's several words. Listen carefully so we don't have to do this again. Mr. Secretary?

MR. COOPER: The amendment would be on Section 4 -- that's page 2 of 10 in the Bill of Rights, line 7 -- to strike the language that currently reads, "nor make a significant change in any person's life, and insert the language, "nor be deprived equal protection of the laws, enjoyment of a person civil rights, or be discriminated in the exercise thereof."

PRESIDENT CASSELL: All right.

MR. LOVE: Slower.

MR. BRUNING: Slower.

MR. KAMENY: Repeat, please.

PRESIDENT CASSELL: Apparently, this has not been distributed.

MS. HARRIS: No. This is the first reading.

PRESIDENT CASSELL: All right. Let's just read this just once more, and slowly.

MR. COOPER: The amendment by Ms. Harris would be to Section 4 on page 2, line 7; delete the language "nor make a significant change in any person's life," and insert in its stead, "nor be deprived equal protection of the laws, enjoyment of" --

MR. LOVE: Stop.

MR. COOPER: Insert on line 7, "nor be deprived equal protection of the laws, enjoyment of a person's civil rights, or be discriminated in the exercise thereof."

PRESIDENT CASSELL: All right. Discussion from the committee?

MR. MARCUS: We'd like to reserve our right to discuss.

PRESIDENT CASSELL: Further discussion?

(No response.)

PRESIDENT CASSELL: There being none -- delegate Robinson?

MR. ROBINSON: Mr. President, I have delivered to the amendments table an amendment that I believe will sufficiently change the language of this section, and it will also encompass what delegate Harris is attempting to do, and I would like to offer a substitute.

PRESIDENT CASSELL: There is a motion on the floor now.

MR. ROBINSON: Sir?

PRESIDENT CASSELL: You're out of order. You're not speaking to the motion.

MR. ROBINSON: May I offer a substitute motion, then? Would a substitute be in --

PRESIDENT CASSELL: No.

MR. ROBINSON: It wouldn't?

PRESIDENT CASSELL: The procedure that we're following now is that there will be a first and a second amendment. We'll vote those up or down. If they fail, then a substitute motion is in order, and that's the procedure that we've been following.

MR. ROBINSON: Okay, thank you.

PRESIDENT CASSELL: All right. Is there now a discussion from the committee? Delegate Jackson?

MR. JACKSON: Yes, sir. We'd like to oppose this

for several reasons. First of all, I know there will be much discussion in the anti-discrimination section. Now, Mr. Chair, we cannot use the due process section here to deal with that, and that is what I think it does, in part, when it deals with the establishment of civil rights and things like that.

Mr. Chair, we both know that the state doesn't marry anybody, and so I don't know where that argument comes. By someone getting married -- that's not a significant change in status, and neither is divorce. By someone going into the service -- then, Mr. Chair, they are under military law or something else, so that has nothing to do with this.

Again, we're using one argument for another. I can understand the zest for certain things, but it really has nothing to do with this. What if we established certain things under equal protection where they are not due? Then we cause problems.

Mr. Chair, it also deals here with property rights, and what we are saying here is that no one shall be caused significant change which, in the main, deals with either property or jobs without due process. That is all it means.

MR. KAMENY: Or the closing of a school.

MR. JACKSON: The closing of a school, the firing of

an untenured teacher who had been there and who may not have a contract, but who wants to fight for his job.

So, Mr. Chair, we urge the body to vote against this because what would be added to it would then be dangerous and would not be dealing with what we're talking about in the main -- the deprivation of one person's due process.

PRESIDENT CASSELL: Delegate Oulahan?

MR. OULAHAN: I'd like to support the Harris amendment. I want to point out, so far as I can see, nowhere in the bill of rights section do we find an equal protection provision. It's almost as if it was left out on purpose. Indeed, if we interpret the bill of rights, it denies people protection because it makes some people so much more equal than others that it does not achieve any kind of bill of rights. I support Harris' amendment.

PRESIDENT CASSELL: Further discussion on the Harris amendment? Garner?

MR. GARNER: I also support the Harris amendment because I think I understand the words that she uses, and I don't understand the words, "nor make a significant change in any person's life," and I urge you to adopt the Harris amendment.

PRESIDENT CASSELL: Delegate Mason?

MS. MASON: Mr. President, maybe I don't have it copied accurately. It starts with "be deprived." Does it mean that the state shall not be deprived?

MR. LOVE: "The state shall not deprive."

MS. MASON: I think I have "be deprived equal protection."

MS. HARRIS: "Nor be deprived."

MS. MASON: "The state shall not deprive any person of life, liberty or property, nor" --

MS. HARRIS: What it's saying that a person shall not be deprived from protection of the laws. So, if you read it, it would say, "The state shall not deprive any person of life, liberty or property," and then it says "nor be deprived equal protection of the laws."

It would be "nor deprived." Maybe "be" should come out and it should be "nor deprived."

MR. LOVE: "Nor deprived."

PRESIDENT CASSELL: I think we're talking about just a grammatical phraseology which can be corrected.

Delegate Kameny?

MR. KAMENY: I want to address just briefly delegate Oulahan's contention about equal protection. He seems to be trying to play both ends against the middle. When we do

put in something and it's not in the federal Constitution, he complains, and when we don't put in something that's in the federal Constitution, he complains.

The Fourteenth Amendment clearly extends to the states and the inhabitants thereof equal protection of the laws; we need not put it in. Now, which way do you want it? Do you or don't you, delegate Oulahan?

The whole point therefore is meaningless. I would urge the delegates to ignore it.

(Laughter.)

PRESIDENT CASSELL: Delegate Kameny, thank you. From this point, we will return to the original procedure as stated by the Vice President when he sat in the chair, and that is there shall be one person on the committee who speaks for the committee and responds. There shall only be another one if indeed his clarification is not acceptable.

Delegate Love?

MR. LOVE: I have a question of the maker of this amendment. We have a whole section on freedom from discrimination. Does she see what she has moved as somehow making unnecessary that other section, or do you see this as just relating to this section right here?

PRESIDENT CASSELL: Delegate Harris?

MS. HARRIS: I see it as only being related to Section 4. Am I going to have a chance to speak last?

PRESIDENT CASSELL: Speak while you have the floor.

MS. HARRIS: Okay. The Chair asks that I speak. Several people alluded to the fact about the closing of schools and fighting for jobs, and I think that what this amendment does is that although the federal Constitution may insure equal protection of the laws, the state constitution must also assure equal protection of the law.

It should also indicate that in granting these protections, there should not be discrimination in doing so without due process of law.

MR. MARCUS: Mr. Chair?

PRESIDENT CASSELL: Mr. Baldwin?

MR. BALDWIN: Mr. President, I'm a little appalled when I look around the room and I at least see three lawyers, and they are doing an injustice to this group if they won't stand up and say to us, because some people don't know -- I'm not a legal person, but I happen to know what "due process" means.

What they should be doing is saying to us what due process is, number one; secondly, in very simple terms, that due process shouldn't involve rights and discrimination -- the

— kind of language that delegate Harris is attempting to insert -- and show us where it belongs. It belongs under Section 17, and we shouldn't tie up our due process with that type of language.

I'm not saying it isn't needed, but if it's needed, it belongs in the proper place. So, I would urge the lawyers present to clear that point up for us. To me, due process is a procedural kind of thing, and I've never seen due process get into rights and discrimination, and those kinds of things. If it belongs there, share that with us so that we'll know, and if it doesn't -- if it belongs in some clause or in Section 17 -- share that with us, also.

PRESIDENT CASSELL: Delegate Baldwin has raised a question about a definition of the phrase "due process." The Chair is advised that the committee enjoyed the counsel of a lawyer who is here tonight, and we will ask that he may respond to that question.

MS. JONES: No.

MR. T. MOORE: No.

PRESIDENT CASSELL: Delegate Marcus?

MR. MARCUS: My question to the Chair was that there was an attorney that assisted the committee. Given the fact that the convention's counsel is not present on the floor and

we're trying to answer a deeply technical question, I would think it would be prudent for the convention to at least permit the committee's assistant to answer that particular question.

PRESIDENT CASSELL: The Chair would ask if the delegates would be willing to hear from an individual who is not --

MR. ROBINSON: Point of order.

PRESIDENT CASSELL: Let me finish my statement, please. Yesterday, or the last time we met, the Chair asked the convention's feeling about allowing an individual to speak on the floor who was not a delegate. On that occasion, we did hear from Ms. Barbara Baker, who served a particular committee. The same question is being put to you now.

Delegate Thomas?

MR. THOMAS: Mr. Chairman, I would like to speak on a point of personal privilege. We have been through ten committees, and at no point did we have anyone from the outside speaking to us. Ms. Barbara Baker was an employee of this convention who did research for this convention.

I would object very strongly for you to bring any lawyers, or that committee to bring any lawyers in here to speak to us.

PRESIDENT CASSELL: Thank you. I understand your point now. Delegate Shelton?

MS. SHELTON: I was not clear as to whether this person that you want to bring forward is a lawyer.

MR. MARCUS: Yes.

PRESIDENT CASSELL: Yes.

MR. MARCUS: And he was a volunteer who assisted the committee.

PRESIDENT CASSELL: All right. If we don't have common consent, I'm not going to spend any more time talking about that. Delegate Schrag?

MR. SCHRAG: In response to delegate Baldwin's question about placement of such a clause, it really could be done either way; that is, there are two due process clauses in the federal Constitution. One is in the Fifth Amendment, and it has no equal protection counterpart. The other is in the Fourteenth Amendment, which says, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." So, you could do it either way. There's no one way to do it.

PRESIDENT CASSELL: Delegate Schrag, let me interrupt you to say that delegate Harris wishes to withdraw

that and move on.

MS. HARRIS: I'd like to withdraw it at this point, because it might be out of order here, and bring it at another point within this section.

PRESIDENT CASSELL: Delegate Cooper?

MR. COOPER: Yes. I'd like to clarify because Mr. Baldwin stated that due process was something that's very simple.

PRESIDENT CASSELL: Delegate Cooper, that's not on the floor now. It's not on the floor.

MR. COOPER: Well, yes, it is on the floor, Mr. President, because I'm speaking to Section 4.

PRESIDENT CASSELL: No, no, no; I haven't recognized you. I have recognized you to speak --

MR. COOPER: I'm speaking to Section 4.

PRESIDENT CASSELL: I beg your pardon.

MR. COOPER: My question is to the committee, as to whether they did consider due process as only being procedural, or if they considered substantive due process. I'd like that for the record.

MR. MARCUS: I don't know that I understand your question.

MR. KAMENY: Can you give an example of what you

mean by "substantive due process?"

MR. COOPER: Yes, let me give you an example. Let's say in the state of Columbia, Mr. "x" owns a business and Mr. "x" is doing well and turning a lot of profit. However, Mr. "x's" employees are unhappy with the type of business he's running and they decide to go on strike.

Now, in the Fourteenth Amendment, the way I understand it, if these employees were to strike, they could conceivably be denying Mr. "x" his rights to property by way of his business, and be therefore depriving him of substantive due process of law.

PRESIDENT CASSELL: Just one moment, please.

(Pause.)

PRESIDENT CASSELL: A response from the committee? One moment, now. You understand that our procedure is to have one person to respond from the committee -- a spokesperson from the committee. If that explanation is not satisfactory, then we have another one. I think you have your spokesperson. Delegate Moore said before he left that he was appointing delegate Kameny as the spokesperson.

Therefore, we'll hear your response and then we'll go on, unless your response is totally unclear.

MR. KAMENY: The section says very simply, "The state

shall not," et cetera, et cetera, et cetera. Delegate Cooper's question refers to interactions by and interactions among private individuals. Therefore, his question does not apply to this section.

PRESIDENT CASSELL: All right. Further discussion on this now?

MR. COOPER: May I pursue it?

PRESIDENT CASSELL: No. I think that your question has been responded to.

MR. COOPER: But I wasn't satisfied.

PRESIDENT CASSELL: All right. Is there any other member of the committee, according to our procedure, who would attempt to answer this question?

MR. KAMENY: At this point, the committee says, by consensus, that it does not understand the question.

PRESIDENT CASSELL: We have followed our procedure. Delegate Coates?

MR. COATES: Thank you, Mr. President. I move to strike on line 7 the phrase beginning with "nor" and ending with "life."

MR. ROBINSON: Point of order.

(The motion was duly seconded.)

MR. ROBINSON: Point of order.

MR. BRUNING: Point of order.

PRESIDENT CASSELL: Point of order?

MR. BRUNING: Yes. Very simply, we have been, in the past at least, taking amendments, if possible, written from the table. And it has been the process of the last several nights that those amendments were the ones that were taken first. I know we have at least three up there on this section.

PRESIDENT CASSELL: The point is well taken. That is the procedure that has been established and adopted and that we have to follow. Delegate Coates, I apologize for letting you get started.

MR. COATES: Mr. President, that amendment has been logged with the amendment clerk at the table, the respected delegate Bruning, and is co-sponsored by Coates and Garner.

PRESIDENT CASSELL: I would imagine that it will the Chair in due course, then. Thank you.

MR. COATES: I'm a co-sponsor of that amendment, sir.

PRESIDENT CASSELL: Even so, it will probably reach the Chair. There is no prohibition against what you have co-sponsored coming forth.

MR. COATES: Thank you, sir.

PRESIDENT CASSELL: Delgate Garner has submitted an

amendment. Delegate Garner?

MR. GARNER: That is correct.

PRESIDENT CASSELL: There is discussion on the floor which is disturbing the convention. May we please terminate that and hear delegate Garner?

MR. GARNER: I have written the amendment proposed by delegate Coates, to remove from line 7, I believe it is, the words "nor make a significant change in any person's life" -- to delete that from this section.

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been properly moved and seconded that from line 7 we remove "nor make a significant change in any person's life." Please speak to that motion.

MR. GARNER: I believe this language includes no new protections; that the protections that we need are covered under life, liberty and property. And I do not understand, and I don't think this convention understands, what it would mean to add those words, and I urge you to delete them.

PRESIDENT CASSELL: Delegate Coates?

MR. COATES: Very briefly, sir, not only is it constitutionally vague, it's just vague, period.

(Laughter.)

PRESIDENT CASSELL: Further discussion on the motion?

MS. HARRIS: Move the previous question.

(The motion was duly seconded.)

MR. COATES: We don't need to encumber this document with a proliferation of lawsuits on such vagueness.

MR. OULAHAN: Hear, hear.

PRESIDENT CASSELL: It has been properly moved and seconded that the question be called. Those in favor of terminating debate, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(There were two "nays.")

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: We will now cut off debate and vote on the deletion on the floor. The deletion is to remove from line 7 "nor make a significant change in any person's life." Those in favor of that deletion, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: The deletion is carried. We are back to the original motion now, and that is to adopt the section running from line 6 to line 8, as written.

MR. ROBINSON: Mr. President?

PRESIDENT CASSELL: Yes, delegate Robinson?

MR. ROBINSON: Thank you. Mr. President, I too had given to the amendments table an amendment to strike line 7, from the word "nor" through the word "life." But, sir, I also want to add an amendment to line 8 after the word "law," and I should like to include the following statement after the word "law" on line 8.

PRESIDENT CASSELL: Delegate Robinson?

MR. ROBINSON: Yes, sir?

PRESIDENT CASSELL: I believe that the first line of your amendment has already been taken care of.

MR. ROBINSON: I say there is an addition to that, sir. After the word "law" on line 8, I would like to add the following phrase: "The right of all persons" --

PRESIDENT CASSELL: Delegate Robinson, we're trying to follow what we have here from you.

MR. ROBINSON: It is there written, sir.

PRESIDENT CASSELL: Yes, sir. I'm saying what you have written calls for something which has already been deleted.

Let us try to meld what you're saying with what you've got here and strike what has already been voted.

Now, please proceed with the second part of your amendment.

MR. ROBINSON: Thank you, sir. I should like to add the following words after "law." "The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." I retain the right to speak last, if you will.

PRESIDENT CASSELL: You request the right to speak last. Mr. Secretary, do you have that wording?

MR. COOPER: Yes..

PRESIDENT CASSELL: Mr. Secretary, is it clear at what point that is to be inserted and what is to be inserted?

MR. COOPER: Yes.

PRESIDENT CASSELL: Okay. Would you read that?

(Pause.)

PRESIDENT CASSELL: Delegates, the secretary has reminded us now that if we have to read this three or four times, that's going to be an additional page there; we'll be spending additional money that we don't have. Would everybody please listen very carefully? We're going to ask him to read very, very slowly delegate Robinson's amendment.

MR. COOPER: The Robinson amendment to Section 4 --

MR. OULAHAN: Speak up.

MR. COOPER: The Robinson amendment to Section 4 would add, on line 8 following the word "law," "The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

PRESIDENT CASSELL: Does everybody have that now?

(No response.)

PRESIDENT CASSELL: Discussion on that amendment, please? Discussion? Is there discussion?

(No response.)

PRESIDENT CASSELL: There being none -- the committee?

MR. KAMENY: The committee, by consensus, would accept that amendment.

PRESIDENT CASSELL: The committee, by consensus, accepts that amendment. Will the body, by consensus, accept that amendment?

MR. THOMAS: Yes.

MR. T. MOORE: Yes.

PRESIDENT CASSELL: Very well. We are back to the original motion, as amended. This is Section 4, "Due Process,"

as amended. By consensus, are we ready for the vote on that?

MR. KAMENY: Yes.

PRESIDENT CASSELL: Those in favor of adopting Section 4, as amended, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(No response.)

PRESIDENT CASSELL: Those abstaining?

(No response.)

PRESIDENT CASSELL: Section 4 is adopted. Delegate Mason?

MR. MASON: I move Section 5, "Searches and Seizures/Search Warrant Requirement."

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been moved and seconded that Section 5, "Searches and Seizures/Search Warrant Requirement," be adopted as written. Is there a minority report, or is there an amendment? Delegate Oulahan?

MR. OULAHAN: Mr. President, in view of the Fourth Amendment --

PRESIDENT CASSELL: Please, delegates.

MR. OULAHAN: In view of the Fourth Amendment of the U.S. Constitution, I move that Section 5 be stricken, and I

would request that I be permitted to terminate debate.

MS. JONES: We're not on Section 5.

PRESIDENT CASSELL: We are on Section 5. Is there discussion on that amendment? Discussion?

(No response.)

PRESIDENT CASSELL: Discussion? Delegate Clark?

MR. CLARK: Mr. Chairman, would the mover of the amendment accept that the amendment be changed to read just as Fourth Amendment of the United States Constitution reads?

MR. OULAHAN: I would accept that.

MR. CLARK: If that's the motion, I would speak in support of it.

PRESIDENT CASSELL: Does the body accept the change of the motion made by delegate Oulahan that we substitute for Section 5 similar wording to that in the United States Constitution? Do we have to vote on that?

(No response.)

PRESIDENT CASSELL: Your motion is changed. Delegate Clark?

MR. CLARK: Mr. Chairman, the Fourth Amendment is not one of the more clear amendments, I concede. To crystalize our constitution with the provisions that are in Section 5 would be to inject into the consideration of our statehood

the many debates that now exist within the criminal law community.

This provision appears to me to try to put into words the current state of the law with respect to warranted and unwarranted searches. It also appears to try to freeze the current state of the law with respect to the exclusionary rule; that is, that material which has been taken from a search illegally shall be excluded from evidence.

I tend to be in agreement with most of the provisions of Section 5. However, because of the intensity of that debate, I would suggest that the better language would be to track the Fourth Amendment to the United States Constitution, and to have it as part of the history of this body that at the time that we considered the Fourth Amendment to the Constitution, we considered the status of the law as of May 23rd, 1982.

To not do so -- and this feeling of mine transcends a number of the provisions of this bill of rights -- to not do so will be to bring forward to the discussion of statehood temporal issues and temporal debates that are going on today within the criminal justice community, and to cause those debates to be the focus rather than the focus being upon the question of statehood itself.

I do not feel that by essentially substituting the language of the Fourth Amendment at this juncture, we would be sacrificing any rights of our people, but we may be speeding the day that statehood is adopted.

PRESIDENT CASSELL: All right. There is a motion on the floor. Delegate Oulahan's motion now is revised to track the language of the Fourth Amendment to the United States Constitution. I just might say that whereas some of us might be familiar with that language, all of us who may wish to vote on this may very well not be familiar with that language.

MR. KAMENY: Shall I read it? I have it.

PRESIDENT CASSELL: All right. Delegate Kameny, would you read?

MR. KAMENY: The Fourth Amendment to the Constitution of the United States says, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

MR. BALDWIN: Any questions or discussion on the Oulahan amendment?

MR. OULAHAN: Mr. President, I join in Dave Clark's

— description in support of his motion, and I want to add one other thing. The provision as drafted by the committee presents the most favorable, and indeed probably goes beyond the existing law of search and seizure in favor of those who want to hurt the community.

I feel that this section, along with several others which we'll hit later on, is an attempt to modify the present criminal justice system in the District of Columbia. It can only do mischief against the law-abiding. Thank you.

MR. BALDWIN: Delegate Kameny, do you or your committee wish to respond?

MR. KAMENY: Yes. At the moment, I believe -- correct me if I'm wrong -- actually what we have is delegate Clark's motion on the floor, and I would like to respond to that in the general terms in which delegate Clark spoke.

As was pointed out much earlier, I repeat for the third time this evening -- but you were not present -- the committee has been well aware of the fact that while we are limited to federal constitutional constraints in the rights of persons, we may well go beyond them when we choose.

It was not the intent in drafting this section to conform to the present law. It was the intent in many respects to remedy and correct the present law. As delegate

Clark, of all people here, well knows, the present status of the Fourth Amendment in terms of a decade or so of Supreme Court decisions, is utter and absolute and total chaos. It is incredible and it is unintelligible. Some time, check out what parts of your car are subject to a search. You'll find it could not be more irrational.

Some years back, there was a strong principle that if the government conducted an improper search, the results of that search could not be used against you. That has been badly eroded. It is a valuable principle. It says if the government does wrong to you in terms of a search, they can't convict you or prosecute you with what they find from their wrongful actions. That, I repeat, has been badly eroded. We attempt here to restore that; it is a valuable protection.

We have gone very carefully through recent law, through the present status of Supreme Court decisions, through the protections which we feel our people need against the government banging down your door when it should not do so and coming into your house and ransacking it. That, in essence, is what we are trying to do in a very careful manner here, and that is why this section is so long.

We labored hard on this section, as we have on others. We urge you to support it in your own interests

— against a government who has been given powers which, if you check them out in terms of recent decisions, would appall you. Read this section by section and you will see exactly where it stands. We urge you to adopt this section unchanged, in protection of your own rights and to remedy the present state of the law from the chaos into which it has been thrown in Fourth Amendment terms by the United States Supreme Court in the last 10 or 15 years.

MR. BALDWIN: Delegates Garner, Talmadge Moore, and Barnes.

MR. GARNER: Thank you, Mr. Chairman. I rise to speak in favor of the amendment by delegate Clark. The difference between delegate Clark's motion and the motion of the committee is not in substance. It is what goes written into the constitution and what is legislative history. The intent and the effect is the same.

Delegate Clark gives us six lines; the committee gives us 27. I say the difference isn't worth it. Vote for the Clark amendment.

MR. BALDWIN: Delegate Talmadge Moore?

MR. T. MOORE: I had a point of inquiry. I wanted to ask the committee a question, if I am in order.

MR. BALDWIN: You are in order, sir.

MR. T. MOORE: On line 16, my question is what is "reasonable expectation of privacy?" Does this mean my automobile, the glove compartment, the bathroom? What does that mean?

MR. MARCUS: May we respond?

MR. BALDWIN: Sure, you may respond.

(Pause.)

MR. BALDWIN: Can the committee respond?

MR. MARCUS: It's a complicated answer and we're trying to formulate it.

MR. BALDWIN: They say it's rather complicated, delegate Moore, and we'll come back to it.

MR. MARCUS: We can do it now.

MR. BALDWIN: Have you got it?

MR. KAMENY: The point here is you raised a specific instance, and in that and in others -- and I might say once again if you check out where the present state of federal law puts such intrusions as you indicated, it's weird. However, what this does is it extends to places and circumstances in which the individual has a reasonable expectation of privacy.

If you feel and believe that you, in fact, did, this gives you the right to argue it out in court and at least have your feelings heard and have a chance of prevailing. Without

this, you have to take what the state says is reasonable. It gives you the claim.

MR. T. MOORE: Then we will have a lot of litigation in court on that one particular phase?

MR. KAMENY: Eventually, a glove compartment case would come up and the court would decide. But it would give you the right to have that decided rather than to have it imposed upon you.

MR. BALDWIN: Delegates Barnes, Cooper and Bruning.

MR. BARNES: I have a point of information.

MR. BALDWIN: State your point of information.

MR. BARNES: Does the Clark amendment replace the entire Section 5, as proposed by the committee?

MR. KAMENY: No, it does not.

MS. MAGUIRE: Yes, it does.

MR. BARNES: I would like to know whether the Clark amendment moves to delete the entire Section 5 of the committee and replace it with his wording.

MR. BALDWIN: Yes, it does; yes, it does. Cooper is next, and then Bruning.

MR. COOPER: I'd like to speak in support of the Clark motion, inasmuch as delegate Kameny's comments already said that what they were trying to do here was correct existing

legislation. They made it very obvious in this page-and-a-half almost of this document. I think it's just unwieldy to have the section be that long. From line 23 on, it appears to be all legislative, and I would hope that the language of our U.S. Constitution in the Fourth Amendment would be sufficient and that we would be able to operate under those circumstances.

MR. BALDWIN: Delegate Bruning, and then we'll have a response from the committee.

MR. BRUNING: Yes. I'd like everyone to kindly read this section very carefully, sentence by sentence, and see if you have any fundamental problems with what they are saying, because right now the Fourth Amendment, as law, is a complete mish-mash. Your trunk may or may not be searched under certain circumstances; a briefcase may or may not be openable; your glove compartment may or may not be opened. There is just a change, literally, from day to day.

I think this is an argument that we don't have problems with; that, essentially, the fruit gained from a poisoned tree -- i.e., the stuff that you get from improper and illegal searches -- can't be used against you. That used to be the law of the land, called the exclusionary rule. That piece of law has been steadily chipped away, and it is becoming more and more prevalent that evidence that was seized

illegally and evidence they did not have a right to take from you is now being introduced into court.

MR. BALDWIN: Time, delegate Bruning. We'll ask delegate Marcus from the committee to respond.

MR. MARCUS: Let me just begin the response by elaborating on our response to Mr. Moore. There's a two-part test which is applied by the court in regard to reasonable expectation of privacy. The first part of that test is a subjective standard; it's whether or not that particular individual himself has an expectation of privacy.

The second part of that test is whether or not society recognizes that that person's expectation was, in fact, reasonable. So, for example, if someone is carrying a bag of heroin down the street, is that a reasonable expectation of privacy? Well, no, but that is what we mean in terms of testing reasonable expectation of privacy.

We'd like to echo what Mr. Bruning said and what several people have said. While, in fact, the Fourth Amendment has been very important in terms of beginning to develop a body of law in regard to search and seizure, in fact what has been created is a mish-mash and a chaos.

We have read this particular area to a number of people who are involved in criminal law, both in the prosecution

and the defense of criminal law. In both instances, what we have received is that that certainly clarifies the issue and makes it more possible for reasonable law, for law which is understandable and consistent, to be developed and to be used in the community itself.

MR. BALDWIN: Delegate Schrag?

MR. SCHRAG: I have done what delegate Bruning asked. I have read this carefully, and the phrase that is giving me the most problem is on line 17, "including intrusions by private persons." I wonder if the committee could answer this question for me and for the other delegates, and perhaps any related questions that come to the committee's mind.

Suppose a criminal, knowing that the police may go get a warrant to search his house or find some evidence that he has, and wanting to immunize himself from that search, goes out and gets a crony who can't be traced to him to grab the stuff from his house and then spread it all over the newspapers or turn it over to the police, or whatever.

Since that appears to be an unlawful intrusion by a private person, couldn't this phrase protect the person from a legitimate search -- a search for which a judge could grant a warrant, but really was kind of a put-up job? Isn't this a great change in the law? Is there any state that uses this

— concept of a private search stopping a public search?

MR. MARCUS: Because of the complexity of the question, I'd ask for your indulgence for one minute while we discuss the different areas that are relevant to that question.

MR. BALDWIN: Delegate Blount?

MR. BLOUNT: I'll wait until the committee responds.

MR. BALDWIN: Delegate Marcus, is there a response?

MR. MARCUS: The response we have to your question, delegate Schrag, is that the situation basically is very obscure; that, in fact, it would have to be answered in the courts. We understand that that creates some litigation, but that is, in fact, what courts are there for, and that none of us having spent very much time studying the particulars of that individual case, and none of us, in fact, being attorneys, are qualified to answer that particular question. I doubt that there's an attorney in the room that can answer that particular question.

MS. HARRIS: Is this the committee's view?

MR. MARCUS: Except for Mr. Mason.

MS. HARRIS: Point of information.

MR. BALDWIN: A point of information has been called for.

MR. MARCUS: There is one more piece to the question.

What is essentially meant by that particular phrase is that the police cannot use what is essentially stolen or illegally-gotten information --

MR. KAMENY: Or property.

MR. MARCUS: -- or property to convict someone.

What it does is protect the people, in fact, from a baited situation in terms of people who are essentially hired illegally by individuals to break into your house and impune you.

MS. HARRIS: Point of information.

MR. BALDWIN: Are we ready at this point to vote?

MR. BARNES: I move the previous question.

(The motion was duly seconded.)

MR. BALDWIN: It has been moved and properly seconded that we terminate debate. Those in favor, signify by saying yes.

(A chorus of "yeses.")

MR. BALDWIN: Those in opposition, nay.

(No response.)

MR. BALDWIN: Abstentions?

(One hand was raised.)

MR. BALDWIN: Those in favor of the Oulahan-Clark substitute section, signify by a show of hands.

MR. COOPER: Thirteen.

MR. BALDWIN: Those in opposition, likewise.

MR. COOPER: Twenty-three.

MR. BALDWIN: Abstentions?

MR. COOPER: One.

MR. BALDWIN: The Oulahan amendment was rejected.

Mr. Mason?

MR. MASON: I move Section 5.

MR. BALDWIN: The Chair doesn't have any other amendments at this time.

MR. MASON: Move Section 5.

(The motion was duly seconded.)

MR. BALDWIN: Delegate Bruning, are there other amendments at the amendment table?

MR. BRUNING: No.

MR. BALDWIN: Delegates Cooper, Schrag and Jones.

MR. COOPER: Fellow delegates, I move to strike the language in Section 5 commencing on line 23 down through line 14, the period at the end; strike from line 23 on to the end of Section 5.

(The motion was duly seconded.)

MR. BALDWIN: It has been moved and properly seconded that we strike line 23 through page 2, line 14. Discussion? Is there discussion on the Cooper amendment?

(No response.)

MR. BALDWIN: Mr. Marcus, do you wish to respond representing the committee?

MR. MARCUS: Yes. In fact, what Mr. Cooper's amendment does by striking line 23 to line 14 is it strikes -- excuse me, delegates. Thank you.

Mr. Cooper's amendment, striking line 23 to line 14, strikes out the power of the police to, in fact, act when, in fact, a crime has been committed. So, by striking that particular section, what you do is you remove any protection that, in fact, this state has.

MR. BALDWIN: Other comments? Mr. Oulahan, Mr. Robinson.

MR. OULAHAN: Mr. President, the first paragraph, despite the fact that I think it goes too far, incorporates the provisions of the Fourth Amendment. "The fruits of unlawful intrustions" in line 16 I interpret as including those restrictions --

MR. BALDWIN: We're not there, sir. We're speaking to line 23 through the next page.

MR. OULAHAN: Yes, but I'm trying to say that by taking out that second paragraph, you are not removing the right for the authorities to conduct legal searches.

MR. BALDWIN: Therefore, you're speaking for it?

MR. OULAHAN: Yes.

MR. BALDWIN: Delegate Robinson?

MR. ROBINSON: Yes, sir. Mr. President, I stand to speak in favor of the striking of lines 23 through 14. I feel that this is excessively wordy and borders on legislation, and I would advise and request that all of my fellow delegates do the same.

MR. BALDWIN: Delegate Bruning?

MR. BRUNING: Yes. People have agreed essentially at this point to keep the whole thing in. But we essentially have one paragraph that goes into what we expect not to be investigated, and we have a second section which essentially says what the government indeed has the right to investigate.

For people that have expressed continuing concern that they we are giving away the state to criminals and handcuffing the police, I find it somewhat puzzling that we are then, under the circumstances which we are saying we have a right to do something, saying oh, no, we don't want that enumerated. I'm a little confused.

MR. BALDWIN: Delegate Freeman and delegate Clark.

MS. FREEMAN: I am totally confused that this convention would even consider eliminating the second half

— just for a lot of the reasons that delegate Bruning said, not the least of which is if we eliminate that section, we are essentially saying that a search can't take place, and yet at the same time we're eliminating when a search can take place, which is under the authority of a valid search warrant. So, it's off the wall to consider taking this out.

What this section does is essentially enumerate the circumstances in which, as it says, "warrantless searches and seizures can take place. Now, I suppose if you want to eliminate something, you can start eliminating from line 2 on page 3 and just let the courts go through what they have gone through and the Supreme Court has gone through, and essentially say that all searches have to be done pursuant to a valid warrant and not allow any searches done under any kind of exigent circumstance.

But you certainly can't take away line 23 through line 2 on page 3. You have a nonsensical section.

MR. BALDWIN: The last three speakers, the Chair notes, have spoken to the same point. Delegate Clark, is yours pretty much the same?

MR. MARCUS: Call the question.

MR. BALDWIN: The question has been called for. Is there a second?

(The motion was duly seconded.)

MR. BALDWIN: Those in favor of terminating debate, signify by saying yes.

(A chorus of "yeses.")

MR. BALDWIN: Objection, nay.

(No response.)

MR. BALDWIN: Abstentions?

(No response.)

MR. BALDWIN: Debate has been terminated, and the maker would like a couple of seconds to speak.

MR. COOPER: Yes. Fellow delegates, I strongly urge you to support the motion to strike the language from line 23 down. As I remember, in the past this convention has adopted a fairly sizable legislature and I imagine we'll be spending a lot of money on staff and supplies and salaries for the legislature. And I'd like to leave them some work to do, if anything.

I think that what we have here in lines 12 through 21 is sufficient. There's no need for us to try to define what are unreasonable searches or seizures in our constitution. There's no need for us to define what are "reasonable expectations."

I think that the frame as put forth by the committee

is a very good framework in lines 12 through 21. Anything else then becomes excessive and unnecessary, and I think it hand-ties the legislature. I think we're going to hand-tie the courts as well. Let them be free to legislate and do what's necessary for the state for the times.

Let's not put a 1982 constitution and expect it to work in 1992 or 2002 or 2012, because that's not going to happen. We have a good framework in the first paragraph, and I think that's all that's necessary.

MR. BALDWIN: We will now vote.

MS. FREEMAN: I want to make a motion.

MR. BALDWIN: Yes, you may.

MS. FREEMAN: I move to divide this question so that we consider lines 23, 24, and 25 on page 2, and on page 3, line 1 to the end of the sentence on line 2. I move to divide and consider that first and --

MR. COOPER: Point of order.

MS. HARRIS: That's out of order.

MR. BALDWIN: Point of order?

MR. COOPER: Mr. Chair, first of all, I don't think that motion is in order to divide because my motion is a motion of the whole, to strike all of that language.

MS. HARRIS: That's right.

MR. COOPER: It's not to consider any of that language on its individual merits.

MR. BALDWIN: The motion is out of order.

MR. COOPER: Not only that, but debate has been cut off.

MR. BALDWIN: That's all right; your point is well taken.

MS. FREEMAN: What? Anything can be divided.

MS. HARRIS: No.

MR. BALDWIN: We will now vote. Those in favor of the Cooper amendment, signify by a show of hands.

MR. COOPER: Six.

MR. BALDWIN: Those in opposition, likewise.

MR. COOPER: Twenty-eight.

MR. BALDWIN: Abstentions?

MR. COOPER: One.

MR. BALDWIN: Repeat the count, please.

MR. COOPER: Six in favor, 28 not in favor, one abstain.

MR. BALDWIN: The Cooper amendment was rejected. The Chair has an amendment from delegate Schrag. Delegate Schrag, place it in the form of a motion on the floor so we can act.

MR. SCHRAG: Mr. President, I move to strike the five words on line 17, "including intrusions by private persons."

(The motion was duly seconded.)

MR. SCHRAG: The reason for this proposed deletion is that under the committee's language --

MR. BALDWIN: Just a second, delegate Schrag. Please allow the Chair to properly place it on the floor. It has been moved and properly seconded. The Schrag amendment states delete "intrusion by private persons." Debate?

MR. SCHRAG: These words would apply to the following case. Let's say there are two crooks and they have a falling out; one of them is now an enemy of the other. The second crook wants to turn in the first crook and goes into his house -- perhaps he has access to that house; he has been given a key in the past -- and he gets a gun out of the drawer that has been used to commit a murder and he turns that gun over to the police.

With these words in the section, the police would not be able to use that gun as evidence against the crook from whom it was taken because it had been taken as a result of an unlawful intrusion by a private person. This is hamstringing the police in a totally unprecedented way and is totally unprecedented, so far as I know, in the constitution or the

— laws of any other state. Therefore, I suggest that these words be deleted.

MR. BALDWIN: Further discussion? Is there further discussion?

(No response.)

MR. BALDWIN: One person from the committee. Delegate Marcus?

MR. MARCUS: We have to oppose delegate Schrag's amendment, and there are essentially two reasons why we do oppose it. Those rights which are contained in that sentence, including intrusions by private persons, don't just talk about dope deals and don't just talk about a couple of crooks trying to get even with each other.

We are talking about when the state decides for a political reason, for example, that they, in fact, want to get something from someone. We are permitting the state a vehicle to, in fact, invade your home without having to, in fact, go through the procedure of getting a warrant or having to go through the procedure of getting a sworn oath.

What we're doing by excluding this particular phrase here is that we're opening up a whole loophole, in fact, for the state to use against you -- not just crooks, but against you.

MR. BALDWIN: Delegate Clark?

MR. CLARK: Mr. Chairman, I'm going to vote for the amendment, but I want the opportunity to state for the record very clearly that I disagree with delegate Marcus' presentation. I do not believe that by the elimination of the language, we are authorizing law enforcement to enlist as agents people who are not personnel of the government. When people are not on the payroll of government, they still might be the agents of the government for purposes of the intrusion.

I think I would challenge my colleagues here to be careful in what we say with respect to debate because our words are being recorded. And my vote for this amendment does not in any way say on my part that we intend to authorize the police or any law enforcement agency to enlist civilian support.

It says simply, in a situation such as delegate Schrag presented to us, that that kind of conduct would not be permitted.

MR. BALDWIN: Delegate Jones, did I see your hand?

MS. JONES: No.

MR. BALDWIN: The Chair senses from the group that we are now ready to vote and terminate debate. Those in favor of terminating debate, signify by saying yes.

(A chorus of "yeses.")

MR. BALDWIN: Those in opposition, nay.

(No response.)

MR. BALDWIN: Abstentions?

(No response.)

MR. BALDWIN: Debate has been terminated and we will now vote on the Schrag amendment to delete "intrusion by private persons." Those in favor of that amendment, signify by a show of hands.

MR. COOPER: Thirteen.

MR. BALDWIN: Those in opposition?

MR. COOPER: Twenty-one.

MR. BALDWIN: Abstentions, likewise.

MR. COOPER: Three. Thirteen in favor, 21 not in favor, 3 abstentions.

MR. BALDWIN: Schrag's amendment was rejected. The Chair will now entertain --

MR. MASON: Move Section 5.

(The motion was duly seconded.)

MR. BALDWIN: It has been moved and properly seconded that we adopt Section 5. Those in favor, signify by a show of hands.

MR. COOPER: Twenty-six.

MR. BALDWIN: Those in opposition?

MR. COOPER: Nine.

MR. BALDWIN: Abstentions?

MR. COOPER: One.

MR. BALDWIN: Section 5 has been adopted. Mr. President?

PRESIDENT CASSELL: Delegate Mason, Section 6.

MR. MASON: I move Section 6.

(The motion was duly seconded.)

PRESIDENT CASSELL: It is moved and seconded that Section 6, "Rights of Arrestees and Defendants," be adopted. Discussion? Delegate Shelton?

MS. SHELTON: I'd like to commend the committee for Section 6 and ask whether or not there was any consideration given to extending the rights of incarcerated persons to include the right for rehabilitation services while incarcerated in an institution and being provided with job skills upon their return. Any consideration given to the period of incarceration and the rights thereof?

PRESIDENT CASSELL: Delegate Kameny?

MR. KAMENY: May I defer to delegate Marcus on that?

PRESIDENT CASSELL: You may.

MR. MARCUS: Thank you, delegate Shelton. I'd refer you to Section 10, which is entitled "Punishment," which deals

specifically with the rights of incarcerated persons.

MR. KAMENY: Yes, and it addresses that directly.

MR. MARCUS: And it does, in fact, address that question directly.

MS. SHELTON: Thank you.

PRESIDENT CASSELL: Delegate Simmons?

MS. SIMMONS: I would just like also to point out that in Health, Housing and Human Services on Saturday, we also assured rehabilitation as a section there.

PRESIDENT CASSELL: Delegate Schrag?

MR. SCHRAG: I'd like to know from the committee whether the word "arrest" on line 19 means that at the moment a suspect is arrested, for instance, on a street corner he has to be supplied a lawyer. It seems to say that. "All persons shall have the right to the assistance of competent counsel at the commencement of a custodial interrogation, arrest," and so forth. Does a lawyer have to be present at every arrest?

MR. KAMENY: No. This applies to the Miranda protections. It means that you have to be informed that you have the right of counsel so you may invoke it from that point forward. It doesn't mean that lawyers have to be standing around on street corners waiting for people to get arrested.

MR. SCHRAG: Would the committee accept conforming

language to make sure that it applied to information rather than the --

MR. KAMENY: It would depend on the conforming language. We won't buy a pig in a poke.

PRESIDENT CASSELL: Delegate Oulahan?

MR. OULAHAN: Mr. President, I move that Section 6 be stricken and that there be substituted therefor the language of the Fifth and Sixth Amendments of the United States Constitution.

PRESIDENT CASSELL: Is there a second to that amendment?

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been moved and seconded that Section 6 be stricken, and the language of which amendments?

MR. OULAHAN: Fifth and Sixth.

PRESIDENT CASSELL: The Fifth and Sixth Amendments, as indicated in an amendment submitted to the Chair by delegate Oulahan, be adopted in its place. Discussion?

MR. OULAHAN: May I request that I be permitted to speak last?

PRESIDENT CASSELL: Yes. Discussion from the committee?

MR. MARCUS: Yes.

PRESIDENT CASSELL: The spokesperson for the committee now is delegate Kameny. Do you wish to respond or assign someone to respond?

MR. KAMENY: Delegate Marcus this time will do it.

PRESIDENT CASSELL: Delegate Marcus?

MR. MARCUS: Thank you, Mr. President. The committee opposes the substitute, and opposes it for several reasons. First of all, the Fifth Amendment of the Constitution of the United States, while a finely-crafted piece of language, is addressed later on in the constitution. In fact, it holds a greater number of considerations than simply the rights of arrestees, which is, in fact, what we're addressing here.

So, the relevant question we should be dealing with is the Sixth Amendment of the Constitution of the United States, which, in fact, deals with criminal prosecution. Would it be subtracted from my time if, in fact, I read the Sixth Amendment of the Constitution of the United States?

PRESIDENT CASSELL: Well, I think that we would --

MR. BALDWIN: We have it -- those who have copies of it.

PRESIDENT CASSELL: All right. Then you need not read it, sir.

MR. MARCUS: Okay. In fact, what the Sixth Amendment of the Constitution of the United States does not guarantee -- and the warnings have been discussed -- have, in fact, been provided. In fact, the courts have provided attorneys for people who face trial under the Sixth Amendment, but there are various specifications which take place in the committee's language which do not appear in the Sixth Amendment of the Constitution of the United States which, by the way, was written during a period of time when poor people -- in fact, almost no one had an attorney besides the rich.

In fact, what Section 6 does is provides assistance of a competent attorney. In fact, most criminal appeals, most criminal trials, are often lost as a result of the lack of competent representation; not by a lack of representation, but competent representation, which is a crucial piece at this particular point.

The discussion of custodial interrogation is especially important in this language. That means when someone hauls you down to the station house -- in fact, this has happened to a number of people here -- at least you're entitled to have an attorney available, or be told that you're entitled to have an attorney available during that particular questioning. That is not guaranteed to you under the Sixth

Amendment of the Constitution of the United States.

In fact, the Sixth Amendment of the Constitution of the United States does not provide for the discovery of all evidence held against you. That doesn't necessarily mean the names and addresses of those people who, in fact, may be testifying against you, but simply the evidence which is held by the prosecution against you.

PRESIDENT CASSELL: Time.

MR. MARCUS: Thank you. I will be glad to answer any questions in regard to this.

(Laughter.)

PRESIDENT CASSELL: Further discussion on the amendment? Coates?

MR. COATES: My question, sir, is to inquire of the committee as to how they view the amendment, if it carries, relating to a specific question which the committee section raises and my consideration of it, and that is, in line 23, the phrase "the discovery of all evidence possessed by the state."

Does that mean that the state has to, in advance, reveal its case?

MS. SIMMONS: To the accused.

MR. COATES: If so, is there some corresponding

obligation upon the defendant to disclose his defense?

PRESIDENT CASSELL: Delegate Kameny?

MR. KAMENY: The defendant would not have to disclose his defense, but the state would certainly have to disclose its evidence.

MR. COATES: Before the trial?

MR. KAMENY: Yes.

MR. COATES: What's the rationale, in the committee's view?

MR. KAMENY: That where the state is bringing a prosecution against you, if you are to defend yourself adequately against it, you have the right to know in advance what they are bringing against you so that you can prepare and defend. It assures the fairness of trial. Since they, by the nature of the process, are taking the initiative in prosecuting you, you have the right to know and time to prepare for what it is they are presenting you with in time to prepare your defense properly.

MR. COATES: I don't mean charges.

MR. KAMENY: No, no. You said evidence.

MR. COATES: Evidence.

MR. KAMENY: It's part of the same package. The charges give you the overview; the evidence tells you what you

have to be prepared to respond to in detail, and we think that's minimal fairness.

PRESIDENT CASSELL: Delegate Clark?

MR. CLARK: On that point, Mr. Chairman, I should like to ask if there were given to the law enforcement authorities information premised upon the confidentiality of the informant, and that information then was developed into other information which was to be introduced as evidence, would the part of that which is to be given to the defendant include the identity of the informant?

PRESIDENT CASSELL: Response?

MR. KAMENY: The evidence is not the source of the evidence.

MR. CLARK: All right. I will say this to that point. Where the courts and, to some extent, the legislatures of our country have permitted discovery in criminal cases, the allowance of discovery has been narrowly circumscribed and watched in every instance, and often connected with a sense of mutuality; that is, if the defendant is to produce the names of witnesses, then he may demand from the prosecution the names of witnesses. We have such a rule here. If the prosecution is to give up certain information, the defendant should give up certain information.

It is a debate which rages in the criminal justice community over whether the criminal justice process ought to be closer to the civil process or not. If that was your intent to accomplish, I would suggest that it had better be accomplished through either legislation or court rulemaking. I know of no place in this country where the evidence possessed by the government is constitutionally available to defendants.

I would suggest to you that if I were a criminal, I would come to the state of Columbia to do my trade very quickly.

PRESIDENT CASSELL: Were you speaking against or for the motion?

MR. CLARK: I am speaking for the motion, which would be not to have this section.

PRESIDENT CASSELL: Delegate Feeley?

MS. FEELEY: The question I have I think needs to be addressed to the maker of the motion as well as to the committee. Delegate Oulahan, in his amendment, indicated that the section as proposed by the committee would disrupt the present criminal justice system in the District of Columbia. I wanted a brief explanation of how so by both delegate Oulahan and the committee.

PRESIDENT CASSELL: Delegate Oulahan, your response?

MR. OULAHAN: Briefly, and I will also respond to Mr. Coates. The system will be disrupted because if the prosecution is required to turn over all evidence, the names of confidential informers will be on those documents and the criminal will know darned well where they came from.

Secondly, under the system which we have proposed here, whether the committee likes it or not, the requirement of the words is a lawyer must be present when an arrest is made. Otherwise, the arrest will be invalid and the officer will be sued for having made a false arrest.

Third, I would like to point out that this amendment -- and this is part of my argument -- would completely disrupt the Federal Rules of Criminal Procedure. Rule 16(b) allows evidence to go to a criminal without disclosing names; names can only be disclosed at the time of trial, unless the prosecutor wants to do it.

At the same time, under 16(b), a criminal must produce his own evidence. There's no requirement in this section, and its exclusion will be interpreted as not requiring criminals to turn over their evidence.

PRESIDENT CASSELL: All right. The motion on the floor now by delegate Oulahan is to substitute the Fifth and Sixth Amendments of the United States Constitution for

Section 6, "Rights of Arrestees and Defendants," as provided by the committee.

MR. MARCUS: Delegate Feeley requested that the committee respond to the question.

PRESIDENT CASSELL: Delegate Feeley?

MS. FEELEY: Yes, I did. I asked for the committee to respond.

PRESIDENT CASSELL: Delegate Kameny, do you wish to assign somebody, since you are the spokesperson?

MR. KAMENY: Yes. Delegate Marcus will take this.

PRESIDENT CASSELL: Delegate Marcus?

MR. MARCUS: Thank you, Mr. Kameny. It's interesting how Mr. Oulahan bemoans the collapse of western civilization whenever rights to counsel or the rights of individuals who may end up in the courts are, in fact, secured in the constitution.

Might I repeat for Mr. Oulahan that, in fact, there is nothing which clearly states in here that the names of informants necessarily have to be provided as part of the evidence which is available to the defense.

The second piece that I'd like to make clear is that the information which the prosecution has does, in fact, tend to be available under discovery rules; that what we are, in

fact, doing is institutionalizing and constitutionalizing the provision of information which is, in fact, collected by the machinery of the state, which is far larger than any machinery that any defense could ever put together.

Finally, I have no idea where delegate Oulahan gets the idea that the word "arrest" here means that every time someone is arrested on a street corner, a lawyer must appear at the police car which is sitting right next to that person being arrested. It simply does not say that, in fact. He is developing a specious argument for the purpose of defeating this particular section.

I might remind the body that, in fact, persons in this society are innocent before they are, in fact, proven guilty. What we are simply doing is providing persons who are, in fact, presumed innocent with the tools that they need to conduct a credible defense on their own behalf. Thank you.

PRESIDENT CASSELL: Delegate Freeman?

MS. FREEMAN: I didn't have my hand up.

PRESIDENT CASSELL: Delegate Harris?

MS. HARRIS: I'd like to disagree with delegate Oulahan, and I think he's stretching this point a bit much when he states that a lawyer must be on hand when the arrest is initially made. It seems to me that an arrest becomes a

fact and a matter of record only when it's logged in at a precinct or any other designated place, and then it becomes a matter of record, and then an attorney would be called. I think that we should vote against the amendment.

MR. LOVE: Call the question.

PRESIDENT CASSELL: The question has been called. Those in favor of terminating debate on this question, please indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(No response.)

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: All right. The Oulahan motion is to delete Section 6, "Rights of Arrestees and Defendants," and to substitute for that the Fifth and Sixth Amendments of the United States Constitution.

MR. OULAHAN: May I speak briefly last, Mr. President?

MR. MARCUS: You already spoke.

MR. KAMENY: You already spoke.

PRESIDENT CASSELL: Yes, you may have the last discussion.

MR. OULAHAN: Thank you. Mr. President, I want to point out that the language says that you're entitled to a lawyer whenever you are subject to a deprivation of liberty. Deprivation of liberty occurs the minute a policeman puts his hands on you and he says, "You are under arrest; get into that squad car."

Secondly, I want you to understand, because my friend, Mr. Marcus, has said something about my so-called attacks on due process. Believe me, I want to see a good criminal justice system here; I am just as concerned. But I am more concerned that the balance between the criminal and law-abiding society is being disturbed.

The purpose of criminal law, believe it or not, is the protection of society. It's not for the protection of criminals or the perpetuation of crime. I'm afraid that that has been lost by the committee, and I urge you to adopt my proposal.

PRESIDENT CASSELL: All right. The previous question has been called. Those in favor of the amendment -- that is, the substitution by delegate Oulahan -- indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: Let me see the hands of those in favor of the amendment.

MR. COOPER: Fourteen.

PRESIDENT CASSELL: Those opposed?

MR. COOPER: Twenty-one.

PRESIDENT CASSELL: Abstain?

MR. COOPER: Two.

PRESIDENT CASSELL: The motion loses. Delegate Bruning?

MR. BRUNING: Yes. I'd like to move an amendment in line 18 after the words "persons shall," and add the words "in criminal matters."

(The motion was duly seconded.)

MR. BRUNING: I believe that that is what this whole section is about. I think it would make that clear.

MR. KAMENY: The committee accepts this amendment.

PRESIDENT CASSELL: May we accept that by common consent so we don't have to vote on it?

MS. HARRIS: Point of information.

PRESIDENT CASSELL: State your point of information, please.

MS. HARRIS: Yes. My point of information is that at what point do you determine that it is a criminal matter, at the initial arrest, initial contact?

MR. BRUNING: "Criminal" has a legal connotation; that's all I'm saying.

MS. HARRIS: Couldn't it be civil?

MR. ROBINSON: Mr. President, I have clarifying language.

PRESIDENT CASSELL: Mr. Robinson?

MR. ROBINSON: If Mr. Bruning would so consent, I should like to substitute the words "criminal prosecutions" as opposed to "criminal matters."

(The motion was duly seconded.)

PRESIDENT CASSELL: Okay. There is an amendment to that motion, and that amendment is to say, "all persons shall, in criminal prosecutions, have the right to the assistance of competent counsel," et cetera. Discussion? Delegate Kameny, do you care to assign somebody to respond to this?

MR. KAMENY: We will speak later.

PRESIDENT CASSELL: Delegate Kameny, you have the floor.

MR. KAMENY: We defer until others have spoken, if we may.

PRESIDENT CASSELL: Very good. Delegate Shelton?

MS. SHELTON: I need more information. Can you please explain to me what the insertion of these words would mean? It sounds good, but can you give me a better indication?

PRESIDENT CASSELL: We've had one question. Let's make this the last question for clarification from delegate Bruning.

MS. SHELTON: This is a very important insertion in this section and I think, you know, our vote would be more intelligent if we understood a little bit more.

PRESIDENT CASSELL: I'm saying there will be one more. I would hope that the clarification would be made this time.

MS. SHELTON: Yes.

MR. BRUNING: I think "criminal" would mean as opposed to civil, for example. In civil matters, you would not be guaranteed immediately a lawyer. But criminals are arrested and brought into the station house, and then you have all the rights enumerated in the section.

PRESIDENT CASSELL: Further discussion? Delegate Baldwin?

MS. SHELTON: I therefore would like to speak --

MR. OULAHAN: Mr. Chairman, point of order.

PRESIDENT CASSELL: I'm sorry. Did you still have the floor? Do you still want the floor?

MS. SHELTON: Well, I think if this is an accepted interpretation of the committee of this language --

MR. KAMENY: Yes, "in criminal matters." The committee accepted that.

MS. SHELTON: There are many other matters in which people are arrested and their rights are abridged, and I think that the broad sweep of the committee's language allows it to have more opportunity for people who are involved in the law to have their rights protected. Therefore, I speak in opposition to the insertion of that language.

PRESIDENT CASSELL: Delegate Baldwin?

MR. BALDWIN: Mr. Chairman, what's on the floor? Is it "criminal matters" or "criminal prosecutions?" There is a vast difference in those two phrases.

PRESIDENT CASSELL: The motion was to substitute the words "in criminal matters." Delegate Robinson asked if --

MR. ROBINSON: Yes, sir.

PRESIDENT CASSELL: I'm not recognizing you, sir. I'm simply explaining what you did. He offered a clarification which was not accepted.

MR. ROBINSON: I want to withdraw it.

PRESIDENT CASSELL: If you want to withdraw it, I'll recognize you.

MR. ROBINSON: Thank you, sir.

PRESIDENT CASSELL: Very good.

MR. ROBINSON: It was brought to my attention, sir, that that particular word does not necessarily fit the meaning, and I would like to withdraw the word "prosecutions."

MR. KAMENY: Thank you.

PRESIDENT CASSELL: The motion on the floor by delegate Bruning is to insert "in criminal matters" after the word "shall" on line 18. Are we ready to vote?

MR. MARCUS: I'd like to give a definition of "criminal matters."

PRESIDENT CASSELL: Well, that question I think has been answered and nobody has indicated dissatisfaction.

Those in favor of the amendment -- and that is to insert "in criminal matters" after "shall" -- indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Abstain?

(One hand was raised.)

PRESIDENT CASSELL: The ayes have it. Further discussion on Section 6? Delegate Schrag?

MR. SCHRAG: Mr. President, I have an amendment at the desk to delete the word "arrest" on line 19 and substitute instead, on line 21, a new sentence after the word "liberty." "When arrested, they shall be informed of their right to consult with counsel."

(The motion was duly seconded.)

PRESIDENT CASSELL: Again, where do you insert this?

MR. SCHRAG: "When arrested, they shall be informed of their right to consult with counsel." That comes after the word "liberty" on line 21, so that the first two sentences would read, "All persons shall, in criminal matters, have the right to the assistance of competent counsel at the commencement of a custodial interrogation, trial, appeal, and whenever they are subject to a deprivation of liberty. When arrested, they shall be informed of their right to consult with counsel."

This would take care of the wording problem that presently exists in line 19, which does tend to suggest, under the present wording, that at the moment a police person arrests a person on a street corner, there is to be counsel.

MR. KAMENY: The committee accepts the amendment.

MS. HARRIS: Point of information.

MS. SHELTON: Wait a minute.

PRESIDENT CASSELL: First of all, I didn't hear a second to that motion. Was there a second?

MR. OULAHAN: I seconded it.

PRESIDENT CASSELL: Okay. The motion now is to add on line 21 after the word "liberty," "When arrested, they shall be informed of their right to counsel."

Point of information. State your point.

MS. HARRIS: Delegate Schrag, it seems to me when you delete "arrest," are you not deleting "interrogation" right on through to "appeal?"

MR. KAMENY: No.

MR. SCHRAG: No. Just take out the single word "arrest" and substitute the sentence.

MS. HARRIS: I understand that. You're going, then, from interrogation to trial and appeal?

MR. KAMENY: Yes, and making a special situation for arrest.

PRESIDENT CASSELL: All right. Delegate Shelton?

MS. SHELTON: What disturbs me about these changes is that to be informed that you have a right that you cannot afford to carry out is a very serious question. I thought that we were headed toward the posture that when persons were

arrested, we had some sense of responsibility to provide them with competent counsel.

I would dare say that there are very few people who are not aware of their right to counsel, but there is a large majority of us, because of the expense of legal counsel, who cannot afford to provide it. And I wondered whether or not, when we keep chopping away at this, whether or not you're not changing, committee, your intent.

I would question whether or not these wholesale acceptances of insertions and corrections may not do damage to what I consider was your original intent. Therefore, I urge you to consider and to counsel with each other before you just accept every amendment that comes from the floor.

PRESIDENT CASSELL: The committee has accepted the amendment suggested by delegate Schrag. Would the committee want to respond to delegate Shelton's point?

MR. KAMENY: Yes. The opening clause says, "All persons have the right to the assistance of competent counsel."

MS. SHELTON: I understand.

MR. KAMENY: Whether or not they can afford it, they have the right to have counsel there.

MS. SHELTON: All right, carry on.

MR. KAMENY: And note "competent counsel"; we added that with some care.

MS. SHELTON: Carry on.

MR. KAMENY: The new section says that, "When arrested, they shall be informed of their right to consult with counsel," which means they still have the right to consult with counsel, and therefore they have the right to invoke that right.

MS. SHELTON: All right, accepted.

MR. KAMENY: So, I think your justifiable concern is, in fact, addressed here.

MS. SHELTON: Thank you very much.

PRESIDENT CASSELL: Further questions?

MR. COATES: I call the question, sir.

(The motion was duly seconded.)

MR. CLARK: What is the question?

PRESIDENT CASSELL: Those in favor of terminating debate, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(No response.)

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: The motion on the floor is to insert on line 21 -- well, first, to eliminate the word "arrest" on line 19; in line 21, to insert after "liberty," "When arrested, they shall be informed of their right to consult with counsel."

Those in favor of that deletion and that addition, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(There was one "nay.")

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: Section 6 is so amended. Further amendments, further discussion? Clark?

MR. CLARK: Mr. Chairman, I move to strike from line 23 the words "the discovery of all evidence possessed by the state."

(The motion was duly seconded.)

PRESIDENT CASSELL: Which line again?

MR. CLARK: Twenty-three.

PRESIDENT CASSELL: Right.

MR. CLARK: "The discovery of all evidence possessed by the state."

PRESIDENT CASSELL: It has been moved and seconded that on line 23, the words "the discovery of all evidence possessed by the state" be struck. Discussion? Discussion?

MR. KAMENY: The committee wishes to reserve its right to speak at the end of the debate.

PRESIDENT CASSELL: There being no discussion, the committee may speak.

Delegate Moore?

MR. B. MOORE: I wish Mr. Clark would give us the rationale for his omission or his deletion.

MS. SIMMONS: He did it already.

MR. T. MOORE: We don't want to hear it again.

PRESIDENT CASSELL: Delegate Clark?

MR. CLARK: Mr. Chairman, I already basically did earlier.

PRESIDENT CASSELL: Please be quiet.

MR. CLARK: The prosecution of a criminal case moves through a variety of stages. It moves from the stage of investigatory to accusatory, and at that point there is a requirement in our system of jurisprudence that there be possessed evidence constituting probable cause.

Therefore, at the beginning of a case -- in fact, the words of this amendment do not even say that the discovery

— must be available at the time of the beginning of a court case. It could come earlier, but even at the beginning of a court case, the evidence possessed by the prosecution may only be sufficient to show probable cause and not sufficient to prove beyond a reasonable doubt.

That evidence is then in a status of formulation. The prosecution has chosen to begin the case in order to assure the public safety from its perspective by having the person brought to the system of justice. It is only at the point of the trial itself that sufficient evidence must be produced which would show beyond a reasonable doubt that the person who has been charged is guilty of the crime.

The discovery of all evidence possessed by the state by a person who is suspected of a crime could require the presentation of that evidence or the discovery of that evidence prior even to the indictment of the case. Moreover, the availability of all evidence possessed by the state would give to the defendant evidence which might be appurtenant to his case, but not necessarily exculpatory of his participation.

PRESIDENT CASSELL: Time. Delegate Clark, I wonder if you could summarize that in one sentence.

MR. CLARK: How about two?

PRESIDENT CASSELL: Go ahead.

MR. CLARK: The divulging of this evidence could wind up hurting a lot of innocent people, as well as letting convicted people get off.

PRESIDENT CASSELL: Thank you. Further discussion? I know it's hard, folks, but we're going to have to keep the buzzing down. Delegate Jackson?

MR. JACKSON: Mr. Chair, just one thing about this. We understand the concerns, and if Mr. Clark specifically said inclusion of names of informers, then we could deal with that. But, see, we have one problem here because Mr. Clark well knows as a lawyer that in civil cases you have those rights. You have the right to know that information. Why not in criminal cases? That is the thing we are most concerned with.

Mr. Clark also knows that D. C. is one of the worst in the country for withholding evidence and not allowing defendants to know exactly who and what accuses them. This is what we want to cover, because Mr. Clark also knows that the caseload in D. C. is amongst the highest in the country, as is also the incarceration rate.

What we want to do is guarantee certain rights, and if the question is identifying people who are giving the information or something like that, then we would accept clarifying language to that point, if that is what Mr. Clark

— actually means. But, otherwise, we would hope people would vote against this in its present form because it does not do exactly the intended purpose.

PRESIDENT CASSELL: One moment, please.

(Pause.)

PRESIDENT CASSELL: The committee is asking that they add to the explanation and then we vote.

MR. MARCUS: Mr. Clark, we do understand your concern in regard to giving up the evidence. As Mr. Jackson indicated, if the concern has to do with the names of the witnesses, we certainly are willing to accept clarifying language in that regard. We're also willing to accept clarifying language in regard to the time at which evidence is provided to the defendant in a particular case.

PRESIDENT CASSELL: All right. Are we ready to vote on this now? The motion on the floor is to delete on line 23 the words "the discovery of all evidence possessed by the state."

MS. FEELEY: Unreadiness.

PRESIDENT CASSELL: Yes, delegate Feeley?

MS. FEELEY: I don't know whether this is the appropriate time, Mr. President. I wanted to suggest an amendment, if that's proper, not to delete the whole thing, but

rather to add the words "the discovery of" -- what's that -- "exculpatory."

PRESIDENT CASSELL: You have the right to amend the amendment. That right not having been exercised, the motion on the floor, as I indicated, is that "the discovery of all evidence possessed by the state" be deleted. Those in favor of that deletion, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Abstain?

(No response.)

PRESIDENT CASSELL: Let me see the hands of those who support the amendment -- the hands of those who support the deletion on line 23, as read.

MR. COOPER: Fifteen.

PRESIDENT CASSELL: Those opposed, please keep them up.

MR. COOPER: Seventeen.

PRESIDENT CASSELL: Let me get those who are abstaining, please.

MR. COOPER: He voted twice. Three.

PRESIDENT CASSELL: Nobody votes twice now. Was

— there somebody who voted twice?

MR. COOPER: Get the abstentions.

PRESIDENT CASSELL: All right. The abstentions again, please. Abstentions, please.

MR. COOPER: One.

PRESIDENT CASSELL: One abstention. The motion loses. We are back to Section 6, as amended. Those in favor of Section 6 -- yes, sir?

MR. CLARK: I have another amendment.

PRESIDENT CASSELL: You really missed your opportunity. The Chair is going to be lenient this time. I asked twice if there were any amendments.

MR. CLARK: I know.

PRESIDENT CASSELL: Please speak.

MR. CLARK: I had my hand up. The second amendment is on line 23; change the words "the discovery of all evidence possessed by the state" to the words "the discovery of evidence pursuant to standards set by law."

(The motion was duly seconded.)

PRESIDENT CASSELL: Do you have that, Mr. Secretary?

MR. COOPER: Yes.

PRESIDENT CASSELL: May we vote on that? That is not a substantive change. I think it's a matter of clarification.

— Would you accept that, delegate Kameny?

MR. KAMENY: The committee would oppose this because this is a substantive change. The purpose of putting rights in a constitution is to immunize them and insulate them from the vicissitudes of law, so you'll have your rights. If you put into your constitution standards set by law, your legislature will nullify the provisions that we've just voted to maintain. That is why you have rights in a constitution.

Delegate Clark's motion would simply do an end run around the vote which he just lost. I urge you to defeat it.

PRESIDENT CASSELL: Further discussion on delegate Clark's motion?

MR. BARNES: I move the previous question.

PRESIDENT CASSELL: The previous question has been moved. Those in favor of terminating debate, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(There was one "nay.")

PRESIDENT CASSELL: Abstain?

(No response.)

— PRESIDENT CASSELL: The ayes have it. Those in favor of the revision of line 23 as indicated by delegate

Clark, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Let me see the hands of those who favor the revisions indicated by Clark.

MR. COOPER: Sixteen.

PRESIDENT CASSELL: Those opposed?

MR. CLARK: Can the Chairman vote?

MS. FREEMAN: He can vote.

PRESIDENT CASSELL: Check your rules, brother Clark.

MR. COOPER: Nineteen.

PRESIDENT CASSELL: Those abstaining?

MR. COOPER: One.

PRESIDENT CASSELL: The motion loses. What was the count, Mr. Secretary?

MR. COOPER: Sixteen in favor, 19 not in favor, one abstaining.

PRESIDENT CASSELL: We're back to Section 6, as amended. Those in favor of Section 6, as amended, indicate by saying aye.

(A chorus of "ayes.")

PRESIDENT CASSELL: Those opposed?

(A chorus of "nays.")

PRESIDENT CASSELL: Abstain?

MS. CORN: Abstain.

PRESIDENT CASSELL: Let me see the hands of those in favor of adopting Section 6, as amended.

MR. COOPER: She's not in the hall. If she wants to be counted, I would recommend she step in.

MS. HARRIS: Come in.

PRESIDENT CASSELL: Those who want to be counted, please step inside. Delegate Baldwin, there's a vote on the floor.

Jan, may I see you before you go?

MR. COOPER: Twenty-four.

PRESIDENT CASSELL: Twenty-four. Those opposed?

MR. COOPER: Nine.

PRESIDENT CASSELL: Abstain?

MR. COOPER: Three.

PRESIDENT CASSELL: All right. Section 6 is adopted. Delegate Mason?

MR. MASON: I move Section 7, "Grand Jury."

(The motion was duly seconded.)

PRESIDENT CASSELL: It has been moved and seconded that Section 7 be adopted as written. Discussion, please?

Section 7? Please pay attention. Delegate Oulahan?

MR. OULAHAN: Mr. President, I move that Section 7 be stricken and that there be substituted therefor the Fifth Amendment of the federal Constitution.

(The motion was duly seconded.)

MR. OULAHAN: I reserve the right to close debate.

PRESIDENT CASSELL: You request the right.

MR. OULAHAN: Okay.

PRESIDENT CASSELL: Thank you.

MS. HARRIS: Point of information.

PRESIDENT CASSELL: Point of information. State your point.

MS. HARRIS: I'm very much concerned with the way in which the federal Constitution is being proposed to be substituted for work the committee has done. If it continues in this manner, maybe we don't need to be here, if we just adopt the federal Constitution. I think it is a disregard for the committee's work when, each time, we come up with a section where the federal Constitution is proposed to be placed instead of what is being proposed by the committee.

I would urge delegate Oulahan to try to work in the framework of the committee.

MR. OULAHAN: Point of personal privilege.